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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

DARRELL J. MOORE,

Plaintiff and Appellant,

v.

HOUSING AUTHORITY OF THE
CITY OF LOS ANGELES,

Defendant and Respondent.

B205489

(Los Angeles County
Super. Ct. No. BC352769)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Elizabeth Allen White, Judge. Affirmed.

Darrell J. Moore, in pro. per., for Plaintiff and Appellant.

Joseph L. Stark & Associates and Joseph L. Stark for Defendant and
Respondent.

Plaintiff and appellant Darrell J. Moore (Moore), in propria persona, appeals a judgment of dismissal in favor of defendant and respondent Housing Authority of the City of Los Angeles (HACLA) following the imposition of terminating sanctions for his willful noncompliance with the trial court's discovery orders.

The essential issue presented is whether the trial court abused its discretion in imposing the ultimate sanction of dismissal.

For the reasons discussed, we perceive no abuse of discretion and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On May 23, 2006, Moore filed suit against HACLA alleging numerous causes of action, including constructive wrongful termination, unlawful retaliation, unfair business practice, and maintenance of a hostile work environment.

On May 16, 2007, the trial court (Judge Elizabeth Allen White) ruled upon a demurrer to Moore's second amended complaint, which ruling sustained demurrers to the bulk of the complaint without leave to amend.

a. Moore's failed attempt to disqualify Judge White.

Following the adverse ruling on the demurrer, Moore sought to remove Judge White from hearing the case.

On October 10, 2007, the trial court entered an order striking Moore's statement of disqualification, ruling the statement of disqualification was untimely and on its face, disclosed no legal ground for disqualification. In said order, the trial court advised Moore the question of matter of disqualification is not an appealable order and may be reviewed only by way of a petition for writ of mandate to the Court of Appeal sought within 10 days of notice of said decision.

Moore thereafter sought writ review. On January 25, 2008, this court dismissed his petition.

b. *Trial court imposes terminating sanctions for discovery abuse.*

On December 28, 2007, after Moore repeatedly failed to comply with discovery and with the trial court's discovery orders, the trial court dismissed the matter pursuant to HACLA's motion for terminating sanctions. The trial court's order includes the following findings:

"1. Defendant properly served written discovery, consisting of written Interrogatories and a Demand for Production of Documents upon the Plaintiff on or about May 16, 2007.

"2. At various times in this action, Defendant properly served Plaintiff with valid notifications of the taking of his oral deposition.

"3. On August 16, 2007, this court considered and granted the Defendant's Motion to Compel Further Responses to Written Interrogatories and ordered Plaintiff to provide verified further answers to said Interrogatories without objection within thirty (30) days thereof.

"4. Plaintiff Moore was present in court at the time of said hearing and order and proper written notice of said order was duly given by Defendant.

"5. On October 23, 2007, this court considered the Motions by Defendant HACLA for Terminating or Evidentiary Sanctions, to Compel Further Response to Demand for Production and to Compel the Attendance of Plaintiff at an oral deposition. On that date, the court granted the Motion to Compel Further Response to the Demand for Production and explicitly detailed to Plaintiff what was required in order to properly respond to the Defendant's Production Demand. On that date, the court denied the Motion for Terminating or Evidentiary Sanctions but reiterated and restated its order requiring Plaintiff to provide further answers to Interrogatories as previously ordered on August 16, 2007 without objection. All further responses were due within twenty (20) days.

"6. On October 23, 2007, this court further ordered Plaintiff to appear for his deposition in the offices of defense counsel on November 12, 2007 for the purpose of taking his deposition. Plaintiff attended the hearing of October 23, 2007, heard

and was aware of the rulings thereon and written notice of said rulings was properly and duly given by counsel for Defendant.

“7. Plaintiff has materially and willfully failed and refused to comply with each of the court’s discovery orders by failing and refusing to appear for his deposition as ordered, failing or refusing to provide proper and reasonable further responses to written Interrogatories without objections as ordered and failing or refusing to provide proper and reasonable further response to the Demand for Production as ordered.

“8. Plaintiff’s refusal and failure to comply with this court’s orders is without justification and appears to constitute willful disobedience and disregard of the lawful orders of the court.

“9. Plaintiff’s refusal and failure to comply with this court’s orders have prejudiced the Defendant in this matter by preventing the Defendant from engaging in permissible and legitimate discovery in this matter. Plaintiff’s refusal and failure to comply with this court’s orders would have the effect of unduly delaying the proceedings and have interfered with the orderly processing of this matter through trial.”

Pursuant to these findings, the trial court granted HACLA’s motion for terminating sanctions.

On January 31, 2008, Moore filed a timely notice of appeal from the judgment of dismissal.

CONTENTIONS

Moore contends: the trial judge was disqualified and should not have made any rulings; the trial court erred in imposing the sanction of dismissal and such sanction was not warranted; Moore met all the requirements for a timely government tort claim; and the trial court should have granted Moore leave to amend his complaint.

DISCUSSION

1. *Moore’s contention Judge White was disqualified and should not have made any rulings in the matter is not properly before this court.*

Code of Civil Procedure section 170.3 provides at subdivision (d):

“The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought only by the parties to the proceeding. The petition for the writ shall be filed and served within 10 days after service of written notice of entry of the court’s order determining the question of disqualification. If the notice of entry is served by mail, that time shall be extended as provided in subdivision (a) of Section 1013.”¹

A petition for writ of mandate pursuant to section 170.3, subd. (d), is the exclusive means by which a party may seek review of an unsuccessful peremptory challenge against a trial judge (§ 170.6), or an unsuccessful challenge for cause. (§ 170.1.) (*People v. Hull* (1991) 1 Cal.4th 266, 273-274; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2007) ¶ 2:259.3, p. 2-121.)

On October 10, 2007, the trial court entered its order striking Moore’s statement of disqualification, and notice of entry of the order was served the same day. Moore’s exclusive remedy was to seek review by way of a timely petition for writ of mandate. He pursued that remedy unsuccessfully. His contention regarding Judge White’s disqualification is not properly raised in this appeal.

2. *No abuse of discretion in imposition of terminating sanctions.*

a. *General principles.*

Section 2023.010, pertaining to misuse of the discovery process, provides, inter alia: “Misuses of the discovery process include, but are not limited to, the

¹ All further statutory references are to the Code of Civil Procedure, unless otherwise specified.

following: [¶] . . . [¶] (d) Failing to respond or to submit to an authorized method of discovery. . . . [¶] . . . [¶] (g) Disobeying a court order to provide discovery.”

Section 2023.030 authorizes the following sanctions for misuse of discovery: a monetary sanction; an issue sanction; an evidence sanction; or a *terminating* sanction, such as an order dismissing the action.

“The award of discovery sanctions is a matter within the trial court’s discretion. In attacking such an order, [the appellant] has the burden of establishing an abuse of discretion.” (*Karz v. Karl* (1982) 137 Cal.App.3d 637, 648.) The trial court has broad discretion to enforce its discovery orders but its discretion is not unlimited. (*Laguna Auto Body v. Farmers Ins. Exchange* (1991) 231 Cal.App.3d 481, 487-488, disapproved on other grounds in *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 478, fn. 4.) Discovery sanctions should be tailored to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery. (*Id.* at p. 487.) The court may not impose sanctions which are designed not to accomplish the objects of discovery but to impose punishment. (*Id.* at p. 488.) A terminating sanction will not be imposed unless the party *willfully* has failed to comply with a court order. (*Ibid.*)

“A willful failure does not necessarily include a wrongful intent. A failure may be deemed willful if the party understood its obligations, had the ability to comply and failed to comply.” (*Morgan v. Southern Cal. Rapid Transit Dist.* (1987) 192 Cal.App.3d 976, 984, disapproved on other grounds in *Schwab v. Rondel Homes, Inc.* (1991) 53 Cal.3d 428, 434.)

Our review is guided by the foregoing principles.

b. *No abuse of discretion in trial court’s imposition of terminating sanctions; the record supports the trial court’s determination that Moore willfully failed to comply with discovery orders.*

As Moore acknowledges, “ ‘ “[o]nly two facts are absolutely prerequisite to imposition of the sanction: (1) there must be a failure to comply . . . and (2) the

failure must be willful.” ’ ’ (*Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1545.)

Here, the trial court found: “7. Plaintiff has materially and willfully failed and refused to comply with each of the court’s discovery orders by failing and refusing to appear for his deposition as ordered, failing or refusing to provide proper and reasonable further responses to written Interrogatories without objections as ordered and failing or refusing to provide proper and reasonable further response to the Demand for Production as ordered. [¶] 8. Plaintiff’s refusal and failure to comply with this court’s orders is without justification and appears to constitute willful disobedience and disregard of the lawful orders of the court. [¶] 9. Plaintiff’s refusal and failure to comply with this court’s orders have prejudiced the Defendant in this matter by preventing the Defendant from engaging in permissible and legitimate discovery in this matter. Plaintiff’s refusal and failure to comply with this court’s orders would have the effect of unduly delaying the proceedings and have interfered with the orderly processing of this matter through trial.”

The record amply supports the trial court’s findings that Moore willfully failed to comply with the court’s discovery orders.

On May 16, 2007, HACLA served Judicial Council form interrogatories on Moore. Moore’s responses were deficient, resulting in HACLA’s filing a motion to compel further responses to interrogatories. On August 16, 2007, the motion was granted and Moore was ordered to provide further responses within 30 days. After expiration of the 30 days, HACLA filed a motion for terminating sanctions for Moore’s failure to comply with the August 16, 2007 order. On October 23, 2007, the trial court denied said motion for terminating sanctions but again ordered Moore to comply with the August 16, 2007 order and to provide further interrogatory responses within 20 days. Moore failed to comply with the October 23, 2007 order, which led to HACLA’s filing another motion for terminating sanctions on

November 14, 2007. This time, based on Moore's "history of non-compliance with court orders," the trial court granted HACLA's motion for terminating sanctions.

The chronology is similar with respect to HACLA's attempts to procure a response to its request to produce documents. On May 16, 2007, HACLA served Moore with a request to produce documents. Moore failed to respond. After Moore indicated he was unable to pay to reproduce the documents he wished to produce in response to the request, HACLA agreed to pay to have its copy service duplicate said documents. In exchange, Moore agreed to specify which documents were being produced in response to each category of the request for production of documents. Two weeks later, HACLA received over 1,000 documents without any designation of which documents were responsive to each request. On August 28, 2007, HACLA filed a motion to compel further responses to request to produce documents. On October 23, 2007, the trial court ordered Moore to provide a supplemental response within 20 days, directing Moore to show HACLA "what documents support your allegations and not just return to [HACLA] the same thousand pages." Moore failed to comply, resulting in HACLA's November 14, 2007 motion for terminating sanctions.

As for Moore's deposition, after he failed to appear, HACLA filed a motion to compel the deposition. The trial court set Moore's deposition for November 12, 2007, at 10:00 a.m., at the office of HACLA's counsel. The trial court admonished Moore that failure to appear could result in a terminating sanction. At 10:20 a.m on November 12, 2007, 20 minutes after the scheduled start time, Moore called to advise he was at a doctor's office and could not attend the deposition that day.²

² According to Moore's own papers, he went to the L.A. Free Clinic on November 9, 2007 and was told he could not be seen that day, so he got the first available walk-in clinic appointment, which was November 12, 2007. These circumstances do not indicate a sudden medical emergency on the morning of November 12, 2007.

HACLA then moved for terminating sanctions, based, inter alia, upon Moore's failure or refusal to comply with the trial court's order to appear at deposition.

We conclude the record fully supports the trial court's determination that Moore willfully failed to comply with its discovery orders.

c. The sanction was not excessive under the circumstances.

Moore further contends the trial court abused its discretion by invoking the ultimate sanction of dismissal, rather than a lesser sanction. Moore relies on the principle that discovery sanctions should be tailored to the dereliction, and should not exceed that which is required to protect the interests of the party entitled to but denied discovery. (*Laguna Auto Body v. Farmers Ins. Exchange, supra*, 231 Cal.App.3d at p. 487.)

Given Moore's repeated and willful discovery abuse, the trial court did not abuse its discretion in finally imposing a terminating sanction. That sanction did not exceed what was required to protect the interest of the party entitled to but denied the discovery. Moore did not suffer the ultimate sanction for the first transgression of a discovery rule. The order of dismissal was the culmination of a series of events in which Moore failed to respond to discovery and to court orders. The record supports the trial court's determination that that any lesser sanction would have been ineffective.

Accordingly, the trial court acted within its discretion in imposing a terminating sanction.

3. Remaining issues not reached.

In view of our conclusion the trial court properly imposed a terminating sanction, it is unnecessary to address Moore's contentions that he met all the requirements for a government tort claim, and that he should have been granted leave to amend his complaint.

DISPOSITION

The judgment is affirmed. HACLA shall recover its costs on appeal.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.